HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2) (b)

Description of the case.

WP S/S No. 4734 / 01
Smt. Gangesh Sharma

Vs

State of Uttaranchal
& others

Approved for reporting.

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Not approved for reporting

Date of decision 19.8.2006

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 4734 of 2001 (SS)

Smt. Gangesh Sharma wife of Late Vijai, Resident of G-30/5, New Tehri, District Tehri Garhwal ..... Petitioner

Versus

1. State of Uttaranchal through Secretary, Ministry of Health, Dehradun
2. Director General, Uttaranchal Health Services Chandra Nagar, Dehradun
3. The Chief Medical Officer, New Tehri, District Tehri Garhwal
4. Medical Officer Primary Health Centre, Chamba, District Tehri Garhwal ..... Respondents

Sri Rakesh Thapliyal, Advocate for the petitioner
Standing Counsel for the respondents.

Dated: 19.8.2006

Hon'ble Rajesh Tandon, J.

Heard Sri Rakesh Thapliyal counsel for the petitioner and Standing Counsel for the respondents.

By the present writ petition, the petitioner has prayed for a writ of mandamus directing the respondents to release the entire arrears of salary of the petitioner for the period commence from September 1993 to September, 1999.

Briefly stated the petitioner was initially appointed on 10.7.1984 as A.N.M. (Auxiliary Nurse and Midwife) in the Health Department and since then she is continuously working as such. On 26.7.1991 the petitioner was transferred to Primary Health Centre, New Tehri by way of mutual transfer on request with Smt. Pawan Solanki. When the petitioner proceeded to his

new place of transfer i.e. Additional Primary Health Centre, New Tehri, one Smt. Manju was given joining at the place of the petitioner on 27.7.1991 and thereafter the petitioner was directed to take over the charge at Sub Centre, Dharkot Primary Health Centre. She complied with the direction and gave her joining at New Tehri on 31.8.1991. Subsequently the petitioner was attached at Additional Primary Health Centre, New Tehri vide office order dated 24.9.1991. Thereafter vide order dated 6.7.1992 the petitioner was permanently transferred to Additional Primary Health Centre, New Tehri. According to the petitioner her salary was withheld by respondent no. 3 with effect from September 1993, without any notice or without assigning any reason.

The petitioner filed a claim petition No. 1363 of 1994 Smt. Gangesh Sharma vs. State of U.P. and others before the U.P. State Service Tribunal which has been dismissed by the Tribunal vide order dated 4.9.1999. After the judgment of the Tribunal, the petitioner joined her duty at Dharkot on 15.9.1999 but she was not paid salary from September 1993 to September 1999.

The mere allegation against the petitioner is that she was transferred from New Tehri to Dharkot but she has not joined her duty at Dharkot. However, the petitioner has asserted that no such order of transfer was ever communicated to her. The petitioner filed a writ petition No. 33385 of 2000 before Allahabad High Court against the order of the Tribunal which was finally decided vide order dated 3.8.2000 and the petitioner was directed to submit a representation to the respondent. According to the petitioner she preferred a representation before the Director General on 31.8.2000 and

again on 14.12.2000 but she has been directed vide letter dated 3.1.2001 to take leave for the disputed period.

The contention of the petitioner is that the action of the respondents for withholding the salary of the petitioner is wholly illegal and unsustainable. The salary of the petitioner was withheld without initiating disciplinary proceedings against her and without given her opportunity to be heard.

Counter affidavit has been filed by the respondents. It has been submitted in the counter affidavit that in compliance of order dated 24.9.91 the petitioner was attached in Additional P.H.C. New Tehri till further orders, which was later on cancelled by the C.M.O. Tehri Garhwal vide his order dated 22.6.1993 and she was directed to go and join at her place of posting but the petitioner did not comply. Although the petitioner was relieved from Additional P.H.C. New Tehri to Dharkot on 23.6.93 but she did not comply and absented herself from Government duty without any leave till 15.9.1999.

Counsel for the petitioenr has urged that no opportunity of hearing was given to the petitioner and order of withholding salary was passed against her without initiating any inquiry. The alleged transfer order was never served upon the petitioner.

Counsel for the petitioenr relied upon the case of D.K. Yadav vs. J.M.A. Industries Ltd; (1993) 3 SCC 259, where the Apex Court has held as under:

"It is a fundamental rule of the law that no decision just be taken which will affect the right of any person without fist being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil

consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill vs. Chief Election Commissioner (1978) 1 SCC 405 the Constitution Bench held that civil consequences covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehension connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edn. Page 1487 defined civil rights are such as belong to every citizen of the state of country..... they include..... rights capable of being enforced or redressed in a civil action..... In State of Orissa vs. (Miss) Binapani Dei (1967) 2 SCR 625 this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence is support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principle of natural justice.

In state of W.B. vs. Anwar Ali Sarkar 1952 SCR 284: AIR 1952 SC 75 per majority, a seven Judges Bench held that the rule of procedure laid down by law comes as much within the

purview of Article 14 of the Constitution as any rule of substantive law. In Maneka Gandhi vs. Union of India (1978) 1 SCC 248 another Bench of seven Judges held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority, which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must taken care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way, which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner

which is patently impartial and meets the requirements of natural justice."

The Apex Court in the case Shrilekha Vidyarthi vs. State of U.P. AIR 1991 SC 537 has held as under:

"It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Art. 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test is every state action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

....

Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you.' This what men in power must remember, always.

Almost a quarter century back, this Court in S.G. Jaisinghani vs. Union of India (1967) 2 SCR 703, at pp. 718-19

: (AIR 1967 SC 1427 at p. 1434). Indicated the test of arbitrariness and the pitfalls to be avoided in all state actions to prevent that vice, in a passage as under:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be confined within clearly defined limits. The rule of law from this point of view means that decisions should le made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law (see Dicey "Law of the constitution"

Tenth Edn. Introduction ex). "Law has reached its finest moments" stated Douglas, J. in United States v. Wunderlick (1951-342 US 98: 96 Law Ed 113), "When it has freed man

from the unlimited discretion of some ruler..... where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice, Discretion, as Lord Mansfield stated it in classic terms in the case of John Wikes (1770-98 ER 327) "means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful."

The petitioner was transferred from Dehradun to Tehri Garhwal vide transfer order dated 26.7.1991 and she was attached to P.H.C. New Tehri vide order dated 24th September 1991 passed by the Chief Medical Officer, Tehri Garhwal. Thereafter she was permanently transferred to P.H.C. New Tehri vide order-dated 6.7.1992 passed by the Chief Medical Officer, Tehri Garhwal. The extract of the order dated 6.7.1992 is quoted below:

fuEufyf[kr ,0,u0,e0 dks LFkkukUrj.k muds uke ds lEeq[k vafdr LrEHk † ij rkRdkfyd izHkko ls fd;k tkrk gSA

dz0 la0 deZpkjh dk uke rSukrh dk	orZeku rSukrh dk LFkku	ubZ rSukrh dk fVIi.kh LFkku
f- Jherh xaxs'k 'kekZ vfr0izk0Lok0 dsUnz	mi dsUnz &	/kkjdksV ubZ fVgjh

„- Jherh eatw pkSgku vfr0izk0Lok0dsUnz mi dsUnz /kkjdksV lEc) vfr0 ubZ fVgjh izk0Lok0 ds- ubZ fVgjh

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g0 ds0 lh0 ,l0 uk;j
eq[; fpfdRlkf/kdkjh
fVgjh x<oky

Annexure-4 copy of the charge certificate shows that in compliance of the above transfer order she has taken over charge at Additional P.H.C. New Tehri in the forenoon of 11.7.1992.

Thus there is no ambiguity that the petitioner was earlier attached to the P.H.C. New Tehri vide order dated 24.9.1991 but later on she was transferred to P.H.C. New Tehri vide order dated 6.7.1992 and she took charge of the post on 11.7.1992.

A copy of alleged transfer order dated 22.6.1993 (annexure A-4) filed by the respondents along with counter affidavit shows that the attachment of the petitioenr Smt. Gangesh Sharma has been set aside and she was sent back to P.H.C. Chamba (sub Centre Dharkot) where she was originally posted. The extract of the order dated 22.6.1993 is quoted below:

dk;kZy; eq[; fpfdRlkf/kdkjh] fVgjh x<oky

la[;k ƒ‡„@‹…&‹† fnukad twu „„] ƒ‹‹…

vkns'k

fuEukafdr csfld efgyk gsYFk odZj dk LFkkukUrj.k@lek;kstu muds uke ds lEeq[k vafdr izk0Lok0 ds0 ds vUrxZr rkRdkfyd izHkko ls fd;k tkrk gSA

,0,u0,e0 dk uke midsUnz@izk0Lok0ds0	orZeku rSukrh dk fooj.k LFkku dk uke tgkW ij LFkkukUrj.k@lek;kstu fd; x;k
ƒ-	
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…-	
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Š-	
‹-	Jherh xaxs'k 'kekZ vfr0izk0Lok0ds0 ubZ izk0Lok0ds0pEck ewy rSukrh dk LFkku fVgjh ls lEcU/khdj.k ¼midsUnz /kkjdksV½ /kkjdksV lekIr

A perusal of the above order shows that the petitioner has wrongly been shown as attached to P.H.C. New Tehri. She was earlier transferred to P.H.C. New Tehri after setting aside her attachment order and she was working there after taking charge on 11.7.1992. Thus she was originally posted at P.H.C. New Tehri and not at Dharkot (Chamba).

The documents of record shows that even after the alleged transfer order she continued to work at P.H.C. New Tehri but when payment of salary to the petitioner was not made from September 1993, she made representations on 19.1.1994 and subsequently on 9.3.1994. She also sent a legal notice on 11.5.1995 to the respondents. Thereafter the petitioner has filed a claim petition No. 1363 of 1994 before the Public Service Tribunal for recovery of her salary from September 1993. Under the first proviso to Section 4 of the U.P. Public Services Tribunal Act 1976, any reference in respect of a claim arising out of a transfer of public service is barred from the jurisdiction of the

Tribunal, therefore, the Tribunal was not competent to adjudicate the dispute which was originated by the alleged transfer order dated 22.6.1993.

In view of above, a writ of certiorari is issued quashing the order-dated 22.6.1993 passed by the Chief Medical Officer, Tehri Garhwal. Further a writ of mandamus is issued directing the respondents to consider the payment of salary to the petitioner from September 1993 to September 1999, in accordance with law.

Accordingly, writ petition is allowed. No order as to costs.

Dated: 19.8.2006 **Rajesh Tandon, J.**
*Dhyani